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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-1391

Court of Appeals No. 72-1645

JACK BILLINGSLEY, Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. .....

Court of Appeals No. 72-1645

JACK BILLINGSLEY, Petitioner
vs.
UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Jack Billingsley, by his attorney, Ivan E. Barris, prays that a Writ of Certiorari issue to review the Judgment heretofore entered against him by the United States Court of Appeals for the Sixth Circuit on February 21, 1973, and the denial of the Petition for Rehearing entered on March 13, 1973.

OPINIONS BELOW

The Judgment and commitment of the United States District Court for the Eastern District of Michigan, Southern Division, is unreported, but is set forth hereinafter

(Appendix A *infra*). The Opinion of the United States Court of Appeals for the Sixth Circuit is as yet unreported, but is set forth hereinafter (Appendix B *infra*). The Order of the United States Court of Appeals for the Sixth Circuit denying the Petition for Rehearing is unreported, but is set forth hereinafter (Appendix C *infra*).

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 21, 1973; the Denial of the Petition for Rehearing was entered on March 13, 1973. The jurisdiction of the Court is invoked under Title 28, USC 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I

Does the Hobbs Act (18 USC 1951) proscribe demands made by the business agent of the local union that the contractor use experienced journeymen ironworkers for a particularly hazardous job when the demand does not entail the use of any additional men, but merely the substitution of experienced journeymen for inexperienced workers?

II

Does the Hobbs Act (18 USC 1951) curtail legitimate labor demands of a union official who is honestly acting and representing members of his organization?

STATUTE INVOLVED

18 USC 1951 (Hobbs Act) (Appendix D *infra*)

STATEMENT OF THE CASE

On September 30, 1969, the Federal Grand Jury for the Eastern District of Michigan, Southern Division at Flint, returned an Indictment charging Jack Billingsley with a

violation of 18 USC 1951 more commonly known as the Hobbs Act. In essence, the specific violation of the Hobbs Act was an alleged act of extortion in forcing the hiring of unwanted and superfluous workers by threatening a work stoppage. The trial commenced on Monday, December 13, 1971, and ended on December 15, 1971, when the jury returned a verdict of guilty. On December 17, 1971 a Motion for a New Trial was filed by petitioner Billingsley. On March 24, 1972, the Trial Court denied petitioner Billingsley's Motion for a New Trial and entered a Judgment of Conviction and ordered a commitment of petitioner Billingsley for three (3) years, with the first sixty (60) days to be served in confinement and the remainder of the sentence to be suspended, and the petitioner was placed on probation for a period of two (2) years. Petitioner filed a Notice of Appeal on March 24, 1972.

This case arose from an incident growing out of the construction of a warehouse in Flint, Michigan. In late May of 1965, the W. H. Mechem Company began construction of a warehouse for Shue-Voeks Corporation. The warehouse was to be a one story structure, between 200 and 300 feet wide, and about 600 feet long. The location of the warehouse was unusual in that a portion of it was to be directly under some high tension lines. The warehouse was being built in an east-west direction, with the high tension wires running directly over a portion of the structure in a north-south direction (perpendicular to the warehouse). There were two separate towers of high tension wires, standing side by side, each with six high tension wires, with each wire carrying 138,000 volts of electricity. Only the lines on the towers nearer the warehouse passed directly over the structure.

The Consumer Power man, Vernon Christianson, testified that the lines sagged from the towers,[1] so that the ends, being directly connected to the towers, were higher than the middle of the lines. The lines were arranged in clusters of three on the towers, so that there would be three parallel lines on one side of one tower and three more lines on the other side of the same tower. Of the twelve lines, only the three lines closest to the warehouse on the closer tower were de-energized. Thus, 9 of the 12 lines, including the cluster of three on the far side of the closer tower were energized at all times.

By Sunday, June 27, 1965, the day of the incident, construction of the warehouse had progressed to a point where the workers would have to work on that portion of the warehouse that was directly beneath the high tension wires. The W. H. Mechem Company had arranged in advance with Consumer Power to have the three closest lines de-energized. The request had to be made in advance since there was a rather complicated procedure in de-energizing power lines. The Mechem Company knew it had only a fixed time on that one day to complete the work under the high tension wires because the wires could only be shut down for a definite and limited time on that one day.

The work to be performed by the ironworkers that day involved the use of a crane with a boom. Because the height of the crane with the boom was higher than the structure itself, the clearance between the work area and the lowest of the de-energized wires has to be measured from the tip of the boom. Vernon Christianson, the Consumer Power

[1] Mr. Christianson also testified that the summer heat at the time of construction caused more than the normal amount of sagging.

man, testified that he was unable to say how high the boom was, and correspondingly he was unable to say how great the clearance was between the boom and the lowest de-energized wire, but he did testify, at least in his opinion, that there was "plenty of clearance".

Because of the economic "boom" created by the then rapidly expanding wartime economy, there was an acute shortage of experienced construction workers both in Flint and throughout the State of Michigan. Due to the shortage of experienced workers, the Mechem Company was unable to obtain experienced journeymen tradesmen who are members of the local union ("book" men). As a result, the Mechem Company had to use any available man who was given a permit to work by the business agent of the local union ("permit" men). Of the 12 ironworkers working on the job, 11 were "permit" men and none was a "book" man; although one was a "book" man from another local union ("dobie" man). The principal differences between book men and permit men are experience and training. A book man is a journeyman tradesman who obtains his status either by serving a three year apprenticeship or by passing an examination. As part of the apprentice program, there is mandatory attendance at safety classes. An apprentice ironworker is restricted in working in close proximity to electricity. On the other hand, a permit man is anyone who has been given a permit to work by the business agent of the local union.

On Sunday morning, June 27, 1965, Jack Billingsley, the defendant and petitioner herein, came to the construction site before work had begun. Jack Billingsley was then the business agent of Local 25 of the International Association

of Bridge, Structural and Ornamental Ironworkers. The principal duties of a business agent include jurisdictional matters such as what class of workers can work a particular job, and more importantly for this case, the allocation of manpower. Jack Billingsley had learned the night before that work was going to be performed directly under the high tension lines.[2] On that Saturday night before the incident, Jack Billingsley contacted two members of the local union and requested that they try to get some experienced journeymen ironworkers for the work under the high tension lines.

When Jack Billingsley arrived at the job site, he had a conversation with Dewey Mechem, brother of the owner of the Mechem Company, and manager of the particular job. It is that conversation which is the basis of this case. The Government, along with its chief witness, Dewey Mechem, contends that Jack Billingsley demanded that Dewey Mechem hire five of the journeymen ironworkers who arrived at the job site that day for the sole purpose of extortion by threatening a labor dispute. On the other hand, it was the contention of the defense that Jack Billingsley requested that five journeymen ironworkers be hired out of a concern for safety because of their greater experience. Although their respective versions of the emphasis of the conversation differed, Dewey Mechem did admit while on the stand that Jack Billingsley did mention safety at least once during their conversation (argument).

As a result of the conversation with Jack Billingsley,

[2] Petitioner Billingsley testified that he was especially concerned in view of the fact that an ironworker had received an electrical shock back in March of 1965 while working on another job for W. H. Mechem Company at the other Shue-Voeks warehouse at the site

Dewey Mechem hired five of the journeymen who had shown up at the construction site. Although Dewey Mechem had the authority to send one of his crews of five permit men home if he paid them two hours of "showup" time, he chose to retain his two crews of permit men along with the five journeymen he hired at Jack Billingsley's request. On the stand Dewey Mechem testified that Jack Billingsley did not request him to retain the two crews of permit men he had been using. Thus, the primary issue of the case is whether Jack Billingsley requested that journeymen ironworkers be hired out of a concern for safety, or whether he acted out of an intent to extort as the Government contends.

The trial of Jack Billingsley for violation of 18 USC 1951, more commonly known as the Hobbs Act, for interference with interstate commerce, began on December 13, 1971. It was a relatively brief trial, lasting only a fraction over two days. During a discussion in Chambers, the parties and the Trial Court discussed the instructions to be given to the jury. Defense counsel struck his proposed charge #4 and struck certain words from proposed charge #3 which erroneously indicated that an individual had to be acting from his personal benefit to be guilty of violating the Hobbs Act. The Court indicated it would give the substance of proposed instruction #3 in its modified form.[3]

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[3] In its modified form, defendant's proposed instruction #3 read as follows:

> "Ladies and Gentlemen of the jury, the anti-racketeering statute under which the charges are based has no reference or bearing on action by a labor leader, honestly acting and representing members of his union. It has reference to and bears on interference with interstate commerce by the compulsory payment of money extorted by a labor leader. The act clearly is protective to labor organizations, and labor members and their membership, as it is to employers. *Callanan* v. *U.S.*, 223 F2d 171 (C.C. 8) (sic) (1955)."

After the instructions had been given and the jury had retired, defense counsel objected to the fact that the Court had *not* given the substance of modified charge #3.

REASONS FOR ALLOWANCE OF THE WRIT

QUESTION I

THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This Honorable Court has recently, during the present term of the Court, considered the scope of the Hobbs Act (18 USC 1951). *United States* v. *Enmons,* ..... U.S. ....., 93 S. Ct. 1007 (February 22, 1973). In *United States* v. *Enmons, supra,* this Court held that the Hobbs Act does not reach the use of violence to achieve actually required labor services that the employer in fact needs. On the other hand, the decision of this Court in *United States* v. *Green,* 350 U.S. 415 (1956) held that the Hobbs Act does reach instances where union officials threaten force or violence against an employer to exact "wage" payments in return for imposed, unwanted, superfluous, and fictitious services of workers.

It is respectfully submitted that the facts of this case fall into the "twilight" zone between the *Enmons* and *Green* cases, *supra,* and consequently there is an important question of federal law which has not been, but should be, settled by this Court. In the case at hand, as in *Enmons, supra,* it is not disputed that the contractor actually needed men to work under the high tension lines. The dispute was whether the work would be performed by the experienced journeymen ironworkers that the Petitioner requested be used, or

by the inexperienced permit men that the contractor wished to use. It is not disputed that the contractor had the authority to send his crew of permit men home after paying them two hours of "showup" time if he hired the journeymen ironworkers.

Therefore, the services in question were required by the employer as in *Enmons, supra,* but the employer did not wish to hire the particular men for the needed services, although the hiring of the men requested by the Petitioner did not entail the use of any additional employees. In *Green, supra,* the payments were for unneeded, superfluous workers that did increase the total number of employees. This Court has not ruled as to whether the Hobbs Act proscribes a demand to substitute specific workers for other workers to perform services that are actually required and desired by the employer, but which does not entail the use of any additional employees.

QUESTION II

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF THE COURTS OF APPEALS FOR THE SEVENTH AND EIGHTH CIRCUITS.

In its decision of February 21, 1973, the Court of Appeals for the Sixth Circuit, in commenting about the Trial Court's failure to give proposed instruction No. 3 of the defense, erroneously indicated that the Seventh Circuit had disapproved a similar instruction in *United States* v. *Green,* 246 F2d 155, 160 (7th Cir. 1957). In fact, as was called to the Sixth Circuit's attention both at oral argument and in the Petition for Rehearing, the Seventh Circuit in *Green, supra,* cited approvingly from the decision of the Eighth

Circuit in *Callanan* v. *United States*, 223 F2d 171 (8th Cir.) *Cert. denied*, 350 U.S. 862 (1955).

Both *Green, supra,* and *Callanan, supra,* are in agreement that the Hobbs Act does not curtail legitimate labor activities. However, the Sixth Circuit in its opinion of February 21, 1973, held that the "ramifications" of legitimate labor activities could become unlawful. In *United States* v. *Enmons, supra,* this Court ruled that the Hobbs Act does not reach the use of unlawful means (violence) to achieve legitimate union objectives. Thus the decision of this Court in *Enmons, supra,* impliedly affirms the conclusions of the Seventh and Eighth Circuits that the Hobbs Act does not curtail legitimate labor activities, although certain "ramifications" emanating from the dispute are unlawful.

Therefore, it is respectfully submitted that this Court grant the Writ to settle the conflict which has arisen among the Courts of Appeals as to whether the Hobbs Act curtails legitimate labor demands.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges that the Petition for the Writ of Certiorari be granted.

Respectfully submitted,

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Dated: April ...., 1973.

APPENDIX A

JUDGMENT AND COMMITMENT
(Filed March 24, 1972)

On this 24th day of March, 1972 came the attorney for the government and the defendant appeared in person and Ivan Barris, his attorney.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a jury verdict of guilty has been convicted of the offense of interference with commerce as charged in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three (3) years; However, on condition that the defendant be confined to a jail-type of treatment institution for a period of Sixty (60) days. The execution of the remainder of the sentence of imprisonment is hereby suspended and the defendant is placed on probation for a period of Two (2) years.

IT IS ADJUDGED that the defendant's bond be continued pending his appeal filed this 24th day of March 1972.

IT IS ORDERED that the Clerk deliver a certified copy

of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ STEPHEN J. ROTH
Stephen J. Roth
United States District Judge

APPENDIX B

No. 72-1645

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JACK BILLINGSLEY,
Defendant-Appellant.

APPEAL from the United States District Court for the Eastern District of Michigan, Northern Division.

Decided and Filed February 21, 1973.

Before: PECK and MILLER, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

PECK, Circuit Judge. The appellant was tried before a jury and convicted of a violation of 18 U.S.C. § 1951, known as the Hobbs Act, which amended the Anti-Racketeering Act, for forcing the hiring of unwanted and superfluous workers by threatening a work stoppage. The case arose from an incident growing out of the construction of a warehouse in Flint, Michigan, to be built directly under some high tension lines which ran perpendicular to the length of the warehouse. Six high tension lines crossed the warehouse, each one of which carried 138,000 volts of electricity.

The construction company, the W. H. Mechem Company, arranged in advance with the power company to de-energize the three lines closest to that portion of the warehouse directly beneath the high tension wires. On the Sunday morn-

ing when this work was to be done, the appellant, the business agent of the union local, whose duties included allocation of manpower, arrived at the job site with about ten experienced journeymen ironworkers. He had a conversation with Dewey Mechem, the job manager, which formed the basis for the appellant's eventual conviction.

Of the 12 ironworkers on this job, one was a "book man" (an experienced journeyman tradesman) from another local, and 11 were "permit men" (available men who were given permits to work by the business agent of the local union); permit men are less experienced than book men. Mechem testified that the appellant stated that unless he hired five of the men with him he would shut the job down by causing a labor dispute. The appellant testified that he requested, out of a concern for safety, that five journeymen ironworkers be hired because of their greater experience. The five men were hired, although a foreman testified that he had to shut down a crane at noon because he could not get any work out of the five men hired at the insistence of the appellant. In addition, evidence was introduced which tended to show that the men with the appellant had been drinking prior to the time they arrived at the job site.

At trial, the central theory of the defense was that the appellant was acting in his capacity of business agent for the union local and was motivated by a concern for the safety of the men. Accordingly, the appellant contends that when the District Court agreed to give the government's proposed instruction No. 1:

> "I charge you that under the statute it is not necessary that Mr. Billingsley received any direct benefit; as used in the statute, the term extortion includes

> obtaining from any employer by the use of actual or threatened force, violence and fear, money in the form of wages to be paid to employees for imposed and unwanted services."

the defense was entitled to have its proposed instruction No. 3 given to the jury. The appellant argues that this instruction sets out the accepted principle that the Hobbs Act does not curtail legitimate labor demands:

> "Ladies and gentlemen of the jury, the anti-racketeering statute under which the charges are based has no reference or bearing on action by a labor leader, honestly acting and representing members of his union. It has reference to and bears on interference with interstate commerce by the compulsory payment of money extorted by a labor leader. The act clearly is protective to labor organizations, and labor members and their membership, as it is to employers."

The gravamen of the appellant's objection is that the government's instruction fails to state that the Hobbs Act does not prohbit all demands pertaining to a labor dispute, but only prohibits those demands that are motivated solely by an intent to commit extortion. The government's position is that since this theory of the defense was set forth in the general portions of the Court's charge, no specific instruction was required. *United States* v. *Wingo,* 394 F.2d 484 (6th Cir. 1968). The issue, then, is whether the general charge of the Court contained the substance of the requested instruction. In the relevant part of the Court's general instruction, the Court instructed the jury that:

> ". . . the principal issue before you is the intent

with which the defendant threatened to call a work stoppage. The government claims that it was done with intent and purpose of requiring the Mechem Company to put on and use unwanted and superfluous employees. The defendant claims that is what was done for the purpose of achieving safety in the work operation. As I have already indicated, the burden is upon the government to prove their claim, or beyond a reasonable doubt."

This portion of the charge sets forth the theory of each party clearly and concisely. Other instructions described the offense in the terms of the statute. It is not alleged that the jury was either confused or misled. It is presumed that the jury was one of average intelligence which could evaluate instructions describing the offense with reference to the statutory language and setting out the contentions of the adverse parties; this jury sat for two days, and, in light of this and other instructions, must be presumed to have known the elements of the offense with which the defendant was charged and the theories of the defense and the prosecution. *United States* v. *Malfi*, 264 F.2d 147, 151 (3d Cir.), *cert. denied*, 361 U.S. 817 (1959); *United States* v. *Gordon*, 242 F.2d 122, 126-27 (3d Cir. 1957).

In addition, the denial of a proffered request which is in any respect incorrect is not error. *United States* v. *Kelly*, 349 F.2d 720, 759 (2d Cir. 1965). Although the appellant's requested instruction stated that legitimate labor activities are not prohibited by the Hobbs Act, it failed to state that the ramifications of legitimate labor activities could become unlawful. See *United States* v. *Green*, 246 F.2d 155, 160 (7th Cir. 1957), in which the Court refused to approve a similar

instruction that stated only that legitimate labor disputes were not prohibited by the Hobbs Act. Our review of the record of this case and the relevant authorities satisfies us that the appellant was not prejudiced by the Court's refusal to give this instruction.

Secondly, the appellant contends that the District Court should not have admitted evidence of the appellant's bad reputation. At least three circuits have considered this question, and each has held that evidence of the defendant's bad reputation is admissible in a Hobbs Act prosecution to show that the victim of the threats acted out of fear and that the victim's fear was reasonable. *United States* v. *Tropiano,* 418 F.2d 1069 (2d Cir. 1969), *cert. denied,* 397 U.S. 1021 (1971); *Carbo* v. *United States,* 314 F.2d 718 (9th Cir. 1963), *cert. denied,* 377 U.S. 953 (1964); *Callanan* v. *United States,* 223 F.2d 171 (8th Cir.), *cert. denied,* 350 U.S. 862 (1955). The appellant asks that this Court decline to follow these decisions since there is a strong possibility that a defendant will be convicted on the evidence of his bad reputation alone.

We have considered the appellant's contentions, and the decisions of the Second, Eighth and Ninth Circuits and we find that the reasoning of these decisions is the more persuasive. These decisions rest upon the fact that extortion is an essential element of the Hobbs Act and to prove extortion, it is essential to show that there was a generation of fear in the victim. The reasonableness of actual or anticipated fear is a vital element in these cases, and the reputation of the defendant therefore becomes relevant since such a reputation frequently conveys a tacit threat of violence. Accordingly, the reputation of the defendant is admissible not to show that he was a bad man and likely to commit a

crime, but to indicate that the threats of the defendant were not idle. We agree with the other circuits which have considered this question and hold that the evidence of the bad reputation of the defendant is admissible for the limited purpose of showing the fear and its reasonableness caused by the threats of the defendant.

The appellant next contends that if the reputation evidence is admissible, as we hold, a reversal is nevertheless required in this case because the Court failed to give a cautionary instruction to the jury limiting the use of this potentially prejudicial evidence. However, this issue is not properly before this Court because the defense counsel failed to bring to the Court's attention its failure to give such an instruction. The record shows that the Court indicated at the time of his ruling to admit the reputation evidence that a cautionary instruction would be given as requested by the defense counsel; the instruction was not given, and no objection to this oversight was made. A party may not assign as error any portion of the charge or omission from the charge unless he objects thereto before the jury retires. Rule 30, F. R. Crim. Proc., *Wilson* v. *Wiman*, 386 F.2d 968 (6th Cir. 1967), *Cowen* v. *United States*, 241 F.2d 105 (6th Cir. 1957). The purpose of this rule is to require the counsel to act in time to give the judge an opportunity to correct his error. *Rucker* v. *United States*, 206 F.2d 464 (D.C. Cir. 1953). The relatively slight nature of the reputation evidence in this case precludes a finding of plain error which would allow us to consider the question in the absence of a timely objection. In *Carbo* and *Tropiano*, *supra*, the reputation evidence involved acts of violence and former criminal acts, and limiting instructions were given by the Court, and were upheld on appeal. In this case, how-

ever, the reputation evidence was only that the defendant was "sort of domineering, dictating to contractors," and the prejudicial nature of this testimony is so slight that the failure to give a cautionary instruction does not constitute plain error.

The appellant contends that the trial court failed to instruct the jury that an essential element of the Hobbs Act is that the victim must be placed in either economic or physical fear. However, since no objection to this alleged error was made by defense counsel, we must first consider whether the oversight amounts to plain error prejudicial to the appellant. The omission of an allegedly necessary instruction does not constitute plain error if the instructions viewed in their entirety adequately protected the defendant. *United States* v. *Harris*, 458 F.2d 670, 678, (5th Cir. 1972). In the general charge to the jury concerning the statutory offense in issue, the Court said:

> "The term 'extortion' means the obtaining of property from another induced by wrongful use of force, violence, or fear. The word fear should be given its ordinary meaning as including fear of economic loss. It is not limited to loss by injury, and hence the threat of a work stoppage would come within the definition of an economic loss of the victim."

In addition, we note that the existence of fear in the mind of the victim was not placed in issue by the defense either during the trial or in closing argument. When the evidence and defense counsel's argument do not raise an element of the crime as an issue in the case, and the trial court is not apprised that it must prepare a specific instruction to

cover the issue, the failure of the court should not be treated as plain error. *United States* v. *McKenzie*, 409 F.2d 983 (2d Cir. 1969). There is nothing in the record of this case that would lead us to believe that the omission of a specific instruction on this point constituted reversible error.

The appellant also contends that the Court should have permitted him to reopen the case for the limited purpose of introducing additional evidence concerning the height of the crane relative to the overhead wires. Inasmuch as this decision is vested in the sound discretion of the trial court, and inasmuch as courts should be extremely reluctant to grant reopenings, and inasmuch as evidence of the height of the boom was available to the defense and was introduced in evidence during the trial, we cannot find that the District Court abused its discretion in denying the appellant's motion to reopen the case for this purpose. *United States* v. *Wade*, 364 F.2d 931 (6th Cir. 1966), *Eason* v. *United States*, 281 F.2d 818 (9th Cir. 1960).

We have considered the remaining contentions of the appellant, including the contention that a new trial should have been granted, and we find that they are without merit. The judgment of the District Court is affirmed.

APPENDIX C

(Filed March 18, 1973)
(JAMES A. HIGGINS, Clerk)

No. 72-1645

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

JACK BILLINGSLEY
Defendant-Appellant

ORDER

Before: PECK and MILLER, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

Appellant having filed a petition for rehearing with this Court, and this Court having considered said petition and being duly advised in the premises,

IT IS ORDERED that the petition for rehearing be, and it is, hereby denied.

ENTERED BY ORDER OF THE COURT
/s/ JAMES A. HIGGINS
Clerk

APPENDIX D

§ 1951. *Interference with commerce by threats or violence.*

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section —

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all com-

merce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections, 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

June 25, 1948, c. 645, 62 Stat. 793.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1394

JACK BILLINGSLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The issues presented in this case are whether the trial judge committed error in refusing to give an instruction couched in the language requested by petitioner, and whether the evidence is sufficient to support petitioner's conviction for violating the Hobbs Act.

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of violating the Hobbs Act, 18 U.S.C. 1951, by forcing the hiring of unwanted and superfluous employees on threat of a work stoppage. He was sentenced to imprisonment for three years, with all but sixty days suspended, and probation for two years. The court of appeals affirmed (Pet. App. B).

1. The government's evidence showed that in May 1965, the W. H. Mechem Company began construction of a

warehouse on a site in Flint, Michigan. The one-story warehouse was being built directly under six high tension lines. On Sunday, June 27, construction had progressed to the point where laborers would have to work on the portion of the warehouse directly under the electrical lines. Anticipating that situation, the construction firm's general manager, Derward Mechem, had arranged for the temporary de-energizing of the three lines closest to the work area. Because the wires could be shut down only for that day, Mr. Mechem was eager to complete the work required to be performed under the power lines as quickly as possible.

Of the twelve ironworkers on this job, one was an experienced journeyman and eleven were men of lesser experience who had been given permits by the labor union local to work on the job. On the morning of June 27, petitioner, the business agent of the local, arrived at the construction site with ten journeymen. Petitioner threatened a work stoppage unless five of the men with him were hired. Mr. Mechem acceded to the demand although he believed that the permit men who had been working at the site had done satisfactory work and could adequately perform the job under the high tension wires. In fact, the five men hired at petitioner's insistence worked poorly, causing a foreman to shut down a crane at noon. The foreman reported that the journeymen were not fit for work because they appeared to have drunk heavily before coming to work.

2. The central theory of the defense was that petitioner had demanded the employment of the more experienced journeymen because he was concerned for the safety of his men. Accordingly, he requested a court instruction to the effect that 18 U.S.C. 1951 did not apply to action by a labor union leader honestly representing members

of his union (Pet. 5a-6a). The district court charged the jury that:

> * * * the principal issue before you is the intent with which the defendant threatened to call a work stoppage. The government claims that it was done with the intent and purpose of requiring the Mechem Company to put on and use unwanted and superfluous employees. The defendant claims that is what was done for the purpose of achieving safety in the work operation. As I have already indicated, the burden is upon the government to prove their claim, or theory beyond a reasonable doubt.

Petitioner claims that the court erred in failing to give the instruction in the precise language he requested. But, as the court of appeals properly observed, in its context the instruction as given adequately set forth the theory of each party clearly and concisely. *United States* v. *Green*, 246 F. 2d 155, 160 (C.A. 7), certiorari denied, 355 U.S. 871.[1] The trial judge was not required to use the language urged by petitioner.

3. Petitioner also claims that the factual situation presented does not fall within the scope of the Hobbs Act because the services to be performed by the men

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[1] The court of appeals also concluded that petitioner's requested instruction was incomplete because it did not mention the possibility that ramifications of legitimate labor activity could fall within the proscriptions of the statute. To the extent that the court's discussion could be construed to be at odds with this Court's subsequent ruling in *United States* v. *Enmons*, No. 71-1193, decided on February 22, 1973, that alternative basis for rejecting petitioner's instruction might no longer be acceptable. Nevertheless, since the court of appeals correctly noted that petitioner's requested charge was in essence given in the trial judge's own words, and the instruction as given was proper, further review of the claim addressed to instructional error is not required.

hired at his insistence were necessary rather than superfluous, and the hiring did not entail the use of any additional employees. To the contrary, petitioner's acts of forcing the employer to hire individuals who at the time were knowingly unfit to perform work which could not be delayed, and to substitute them for workers prepared to complete the assigned job in the allotted time, fell within the scope of a statute proscribing the obstruction of commerce "in any way or degree." The additional wages paid to these useless journeymen who evidently worked at a higher pay scale than the permit men they replaced, and who failed to complete their assignment in the limited time available, completed the offense of extortion within the meaning of the Hobbs Act. See *United States* v. *Green,* 350 U.S. 415.

Petitioner's reliance upon *United States* v. *Enmons,* decided by this Court on February 22, 1973 (No. 71-1193), is misplaced. In *Enmons,* the Court, citing favorably its prior ruling in *Green* (slip op., p. 5 n. 5), held that the use of force to achieve legitimate collective bargaining demands was not proscribed by the Hobbs Act. The *Enmons* exception presumes the existence of bona fide employees and a legitimate labor concern. Here the evidence supported by the jury verdict showed that these factors were lacking.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.

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